

The existing 5 NYCRR Part 140 subdivisions (d), (g), (h), (k), (q), (u), (x), (y), (bb), (ee), gg, (hh), (nn), (pp) and (qq) are amended, four new subdivisions (f), (o), (v) and (oo) are added and subdivisions (f)–(qq) are re-lettered to read as follows:

(a) Affirmative Action Program and Equal Employment Opportunity Program. A program involving the implementation of procedures and methods for the identification, recruitment and employment of minority group members and women. Such programs must include equal access to advancement and procedures for investigating claims of discrimination because of race, creed, color, national origin, sex, age, disability or marital status. The overall result to be sought is to expand the employment opportunities of minority group members and women, also referred to as workforce diversity requirements.

(b) Applicant. A business enterprise which has applied for certification as a bona fide minority- or woman-owned business enterprise.

(c) Business enterprise. Any entity, including a sole proprietorship, partnership, limited liability partnership, limited liability company or corporation, including not-for-profit corporations, which is authorized to and engages in lawful business transactions in accordance with New York law.

(d) Certified enterprise or certified business. A business enterprise which has been approved by the division [for] of minority- or woman-owned business enterprise status subsequent to verification that the business enterprise is owned, operated, and controlled by minority group members or women, and that also meets the financial requirements of subdivision [(bb)](ee) of this section, and is a small business pursuant to subdivision [(dd)](gg) of this section.

(e) Chief Diversity Officer. The Governor's principal advisor and representative regarding all matters related to State agency procurement policies concerning minority- and women-owned business enterprises and State agency government workforce diversity.

(f) Commercially useful function. A minority or women-owned business enterprise performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the minority or women-owned business enterprise must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing,

where applicable, and paying for the material itself. A minority- or women-owned business enterprise does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of participation. Factors to be used in assessing whether a minority- or women-owned business is performing a commercially useful function include:

(1) the amount of work subcontracted;

(2) industry practices;

(3) whether the amount the minority or women-owned business enterprise is to be paid under the contract is commensurate with the work it is to perform;

(4) the credit claimed towards minority or women-owned business enterprise utilization goals for the performance of the work by the minority or women-owned business enterprise; and

(5) any other relevant factors.

[(f)] (g) Contract scope of work. For purposes of this Subtitle, contract scope of work shall mean the scope of work set forth in the State contract including, but not limited to, services, products or other deliverables required by such contract and specific tasks required by such contract.

[(g)] (h) Contracting agency. A party to a State contract, as defined in subdivision [(gg)](jj) of this section, and in the case of contractual opportunities emanating from financing provided by the New York State Housing Finance Agency, Housing Trust Fund Corporation or Affordable Housing Corporation, as described in subdivision [(ff)](ii) of this section.

[(h)] (i) Contracting categories. Major procurement categories for which State agencies shall establish [an annual goal plan] a master goal plan or, where applicable, an update to the master goal plan, as defined in subdivisions (x) and (oo) of this section, respectively, to promote the participation of certified minority- and women-owned business enterprises[, and as further defined in section 141.2(b) of this title].

[(i)] (j) Contractor. An individual, a business enterprise, a not-for-profit corporation, or any other party to a State contract, or a bidder in conjunction with the award of a State contract or a proposed party to a State contract.

[(j)] (k) Day or business day. A State business day unless otherwise specified.

[(k)] (l) Directory. The directory of certified enterprises, prepared by the director, for use by State agencies and contractors in complying with the provisions of article 15-A of the Executive Law[, article 15-A].

[(l)] (m) Diversity practices. The contractor's past, present, and prospective practices and policies with respect to: (a) utilizing certified minority- or women-owned business enterprises in contracts awarded by State agencies, other public entities or private sector companies, as subcontractors and suppliers; and (b) entering into partnerships, joint ventures or other similar arrangements with certified minority- or women-owned business enterprises as defined in this part or other applicable federal, state, or local statutes or regulations, or certified by the certifying entities recognized by the division governing an entity's utilization of minority or women-owned business enterprises, and (c) any other information requested by the State agency or activities, supported by affidavit, that demonstrate the contractor's commitment to a policy of diversity practices related to minority- or women-owned business enterprises.

[(m)] (n) Director. The director of the New York State Department of Economic Development, Division of Minority and Women's Business Development, who may also be referred to as the executive director.

(o) Disparity Study. The latest published study of New York State minority and women-owned business enterprise programs commissioned by the State pursuant to section 312-a of the Executive Law.

[(n)] (p) Division. The office in charge of minority and women's business development in the department of economic development.

[(o)] (q) Equal employment opportunities or EEO. A contractor and subcontractor's conscientious and active efforts to afford employment opportunities to minority group members and women without discrimination because of race, creed, color, national origin, sex, age, disability or marital status.

[(p)] (r) Expenditure. Any payment by a State agency, including but not limited to payments made pursuant to a State contract, purchase order, invoice or non-personal services.

[(q)] (s) Goals. The term referring to the percentage of aggregate agency expenditures targeted for the participation of certified minority- and/or women-owned business enterprises sought to be included in State procurement opportunities as prime contractors, subcontractors, suppliers, consultants, joint ventures, teaming agreements, or other similar arrangements. Goals may be expressed as [annual Statewide (also referred to as "Section 313 goals")], agency-specific[, or contract goals.

[(r)] (t) Hearing officer. An individual who has been appointed by the director to hear (1) appeals of decisions denying or revoking certification [,] and (2) complaints regarding [(1)] (i) a State agency's denial of a waiver, [(2)] (ii) a State agency's disqualification of a contractor before an award is made, [(3)] (iii) a contractor's failure or refusal to abide by a utilization plan after an award is made, or [(4)] (iv) a contractor's noncompliance with Equal Employment Opportunity obligations after an award is made.

[(s)] (u) Joint venture. A contractual agreement joining together two or more business enterprises, one of which is a certified minority- or woman-owned business enterprise, for the purpose of performing on a State contract. The certified minority- or woman-owned business enterprise must provide a percentage of value added services representing an equitable interest in the joint venture. All parties agree to share in the profits and losses of the business endeavor according to their percentage of equitable interest.

[(t)] (v) Labor force availability data. Data pertaining to the relevant availability and expected levels of participation of minority group members and women on State contracts. The data is developed by the New York State Department of Economic Development, Division of Minority and Women's Business Development, and is based upon the most recent census data provided by the New York State Department of Labor, Bureau of Labor Market Information, aggregated by the Division of Minority and Women's Business Development into Federal occupational categories.

[(u)] (w) Lessee. An individual or a business enterprise, including concession vendors, or any other party to a lease in which the lessor is a State agency as defined in subdivision [(ee)](hh) of this section.

(x) Master goal plan. An agency-specific annual goal plan, which establishes agency goals and identifies expenditures, strategies, personnel, processes and procedures intended to increase the participation of certified minority-and women-owned business enterprises in the subject State agency's procurement.

[v] (y) Mentor-Protégé agreement. A contract between a prime contractor, the "Mentor," and a minority- or woman-owned business enterprise, the "Protégé," in which there is a transfer of knowledge, technology, or other resources, which promotes the economic growth of the minority- or woman-owned business enterprise or fosters the establishment of a long term business relationship between the parties.

[w](z) Minority group member. A United States citizen or permanent resident alien who is and can demonstrate membership in one of the following groups:

- (1) Black persons having origins in any of the African racial groups;
- (2) Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central American or South American descent of either Native American or Latin American origin, regardless of race;
- (3) Native American or Alaskan native persons having origins in any of the original peoples of North America; or
- (4) Asian and Pacific Islander persons having origins in any of the Far East countries, South East Asia, the Indian Subcontinent or the Pacific Islands.

[x](aa) Minority-owned business enterprise. A business enterprise that is:

- (1) at least 51 percent owned by one or more United States citizens or permanent resident aliens who are minority group members;
- (2) an enterprise in which such minority ownership is real, substantial and continuing;
- (3) an enterprise in which such minority ownership has and exercises the authority to control and operate, independently, the day-to-day business decisions of the business enterprise;
- (4) an enterprise authorized to do business in this State and is independently owned and operated;
- (5) an enterprise owned, [() either directly or through a holding company, ()] by an individual or individuals, whose ownership, control and operation are relied upon for certification, with an individual personal net worth at the time of application that does not exceed three million five hundred thousand dollars, as adjusted annually on the first of January for inflation according to the consumer price index of the previous year starting in 2011; and
- (6) an enterprise that is a small business pursuant to subdivision [(dd)] (gg) of this section.

[(y)] (bb) New York State Department of Economic Development, Division of Minority and Women's Business Development[, or "the division[.]"] The office responsible for implementing the requirements of article 15-A of the Executive Law.

[(z)](cc) New York State minority- and women-owned business enterprise certification application. The form that the division requires an applicant to submit for purposes of applying for minority- or woman-owned business enterprise status.

[(aa)](dd) Not Dominant in its field. A business enterprise which does not exercise a controlling influence on an industry in its field of operation.

[(bb)](ee) Personal net worth. The aggregate adjusted net value of the assets of an individual remaining after total liabilities are deducted. Personal net worth includes the individual's share of assets held jointly with said individual's spouse and does not include the individual's ownership interest in the certified minority and women- owned business enterprise, the individual's equity in his or her primary residence, or up to five hundred thousand dollars of the present cash value of any qualified retirement savings plan or individual retirement account held by the individual less any penalties for early withdrawal. Personal net worth shall be calculated on an individual basis and shall not be aggregated in instances where there are multiple individuals relied upon for certification.

[(cc)](ff) Significant business presence. A business authorized to do business in New York State, and that makes a contribution to the New York State economy through payment of taxes, or the purchase of made in New York State products or materials, or that has any payroll in New York State.

[(dd)](gg) Small business. A business which has a significant business presence in the State, is independently owned and operated, and is not dominant in its field, but in no event employs more than three hundred people. In determining whether the enterprise meets the definition of a small business as herein provided, consideration shall be given to federal small business administration standards prescribed in 13 CFR Section 121.201, effective as of August 22, 2008. A copy of 13 CFR Section 121.201 can be accessed at the Office of Size Standards, Small Business Administration, 409 3rd Street, SW Washington, DC 20416.

[(ee)](hh) State agency.

- (1) any State department;
- (2) any division, board, commission or bureau of any State department;
- (3) the State University of New York and the City University of New York, including all their constituent units except community colleges and the independent institutions operating statutory or contract colleges on behalf of the State;
- (4) a board, a majority of whose members are appointed by the Governor or who serve by virtue of being State officers or employees as defined in subparagraph (i), (ii) or (iii) of section 73(1)(i) of the Public Officers Law;
- (5) A “state authority,” as defined in subdivision one of section two of the public authorities law, and the following: Albany County Airport Authority; Albany Port District Commission; Alfred,

Almond, Hornellsville Sewer Authority; Battery Park City Authority; Cayuga County Water and Sewer Authority; (Nelson A. Rockefeller) Empire State Plaza Performing Arts Center Corporation; Industrial Exhibit Authority; Livingston County Water and Sewer Authority; Long Island Power Authority; Long Island Rail Road; Long Island Market Authority; Manhattan and Bronx Surface Transit Operating Authority; Metro-North Commuter Railroad; Metropolitan Suburban Bus Authority; Metropolitan Transportation Authority; Natural Heritage Trust; New York City Transit Authority; New York Convention Center Operating Corporation; New York State Bridge Authority; New York State Olympic Regional Development Authority; New York State Thruway Authority; Niagara Falls Public Water Authority; Niagara Falls Water Board; Port of Oswego Authority; Power Authority of the State of New York; Roosevelt Island Operating Corporation; Schenectady Metroplex Development Authority; State Insurance Fund; Staten Island Rapid Transit Operating Authority; State University Construction Fund; Syracuse Regional Airport Authority; Triborough Bridge and Tunnel Authority; Upper Mohawk Valley Regional Water Board; Upper Mohawk Valley Regional Water Finance Authority; Upper Mohawk Valley Memorial Auditorium Authority; and Urban Development Corporation and its subsidiary corporations; and

(6) The following only to the extent of state contracts entered into for its own account or for the benefit of a state agency as defined in paragraphs (1) through (5) of this subdivision:

Dormitory Authority of the State of New York;

Facilities Development Corporation;

New York State Energy Research and Development Authority[;

New York State Science and Technology Foundation].

[(ff)](ii) State-assisted housing project. A project which receives a grant or loan for all or part of the total project cost from the New York State Housing Finance Agency, the Affordable Housing Corporation, Housing Trust Fund Corporation or the Division of Housing and Community Renewal;

(1) a permanent housing project for homeless families or project as defined in section 64(5) of the Private Housing Finance Law;

(2) a project as defined in section 1101(12) of the Private Housing Finance Law provided said project is located in a large county and consists of more than 12 residential units at a single site.

For purposes of this paragraph, large county shall have the same meaning as set forth in section 310(5) of article 15-A of the Executive Law;

(3) affordable home ownership development programs or project as defined in section 1111(8) of the Private Housing Finance Law provided said project is located in a metropolitan area as herein defined and consists of more than 12 residential units at a single site. For purposes of this paragraph metropolitan area shall have the same meaning as set forth in section 310(6) of article 15-A of the Executive Law;

(4) a turnkey/enhanced rental project or project as defined in section 1106-a(2) of the Private Housing Finance Law;

(5) infrastructure improvements as defined in section 1131(2) of the Private Housing Finance Law, to the extent that such infrastructure improvements are applied for in connection with a State-assisted housing project as defined in paragraphs (1) through (4) of this subdivision and provided further that the applicant for such infrastructure improvements and for such State-assisted housing project is identical.

[(gg)](jj) State contract. For purposes of this Subtitle, State contract shall mean:

(1) Any written agreement, and amendment(s) thereto, providing for a total expenditure in excess of [\$25,000] twenty-five thousand dollars (\$25,000), whereby a State agency is committed to expend or does expend funds in return for labor, services, including legal, financial and other professional services, travel, supplies, equipment, materials or any combination of the foregoing, to be performed for, or rendered or furnished to the contracting agency;

(2) a written agreement in excess of [\$100,000] one hundred thousand dollars (\$100,000) whereby a contracting agency is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon;

(3) a written agreement in excess of [\$100,000] one hundred thousand dollars (\$100,000) whereby the owner of a State-assisted housing project is committed to expend or does expend funds for the acquisition, construction, demolition, replacement, major repair or renovation of real property and improvements thereon for such project;

(4) leases of real property by a State agency to a lessee where the terms of such leases provide for the State agency to be engaged in construction, demolition, replacement, major repair or renovation of real property and improvements thereon, and the cost of such construction,

demolition, replacement, major repair or renovation of real property and improvements thereon is in excess of [\$100,000] one hundred thousand dollars (\$100,000).

(5) All revenue contracts, as defined in State Finance Law Section 139-j.

~~[(hh)]~~(kk) Subcontract. Any agreement for a total expenditure in excess of twenty-five thousand dollars (\$25,000) resulting from a State contract providing for services, including non-staffing expenditures, supplies or materials of any kind between a [State agency] business enterprise and a prime contractor, in which a portion of the prime contractor's obligation under the State contract is undertaken or assumed by a business enterprise not owned or controlled by the prime contractor.

~~[(ii)]~~(ll) Substantially fails. A contracting agency has failed to meet sixty [60] (60) percent of its annual agency-specific goals.

~~[(jj)]~~(mm) Supplemental Application. The form that the division requires an applicant to submit for purposes of applying for expeditious certification based on certification as a minority- and women-owned business enterprise by entities referenced in sections 144.7 and 144.8.

~~[(kk)]~~(nn) Teaming Agreement. A utilization plan arrangement between two or more parties, one of which is a certified minority- or women-owned business enterprise, to perform on a specific State contract if awarded to the team. The team itself may be a joint venture, or one of the team members may be designated to act as the prime contractor, and the other member(s) designated to act as subcontractors.

(oo) Update to the master goal plan. An annual update to an existing master goal plan that is submitted by an agency to the division in lieu of a full master goal plan as defined in subdivision (x) of this section.

~~[(ll)]~~(pp) Utilization plan. The plan which must be submitted by a contractor to a State agency listing certified minority- and/or women-owned business enterprises that the contractor intends to use in the performance of a proposed State contract, or any components of the contract scope of work which the contractor intends certified minority- and/or women-owned business enterprises to perform. The plan shall specifically contain a list, including the name, address and telephone number of each certified enterprise with which the contractor intends to subcontract, or otherwise submit in connection with satisfaction of the contract goals.

~~[(mm)]~~(qq) Value added. A substantive increase to the performance of a State contract by a certified minority- and/or women-owned business enterprise as a joint venture partner,

subcontractor, consultant, or supplier, where such a certified minority- and/or women-owned business enterprise performs a commercially useful function pursuant to subdivision (f) of this Section.

[(nn)](rr) Verification. Any act necessary to determine whether a business enterprise seeking to be certified by the division is owned, controlled and operated by principals who are members of a minority group, as defined in subdivision [(w)](z) of this section, or women; and that those principals' personal net worth does not exceed the limitations listed in subdivision [(bb)](ee) of this section. Such acts may include, but are not limited to, request(s) for documents in addition to the initial application and inspection of the place of business.

[(oo)](ss) Waiver form. The form provided by a State agency to a contractor as part of a solicitation, relative to a request by the contractor to set aside or modify the participation of certified minority- and women-owned business enterprises in the performance of State contracts.

[(pp)](tt) Women-owned business enterprise. (1) A business enterprise that is:

(i) at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women;

(ii) an enterprise in which the ownership interest of such women is real, substantial and continuing;

(iii) an enterprise in which such women ownership has and exercises the authority to control and operate, independently, the day-to-day business decisions of the enterprise;

(iv) an enterprise authorized to do business in this State and which is independently owned and operated;

(v) an enterprise owned, [(l) either directly or through a holding company, []] by an individual or individuals, whose ownership, control and operation are relied upon for certification, with an individual personal net worth at the time of application that does not exceed three million five hundred thousand dollars, as adjusted annually on the first of January for inflation according to the consumer price index of the previous year starting in 2011; and

(vi) an enterprise that is a small business pursuant to subdivision [(dd)](gg) of this section.

(2) An enterprise owned by a minority group member who is also a woman may be certified as a minority-owned business enterprise, a women-owned business enterprise, or both, and may be counted towards either a minority-owned business enterprise goal or a women-owned business enterprise goal, in regard to any contract or any goal, set by a State agency, but such participation

may not be counted towards both such goals and may not be divided between the minority-owned business enterprise goal and the women-owned business enterprise goal by a State agency.

[(qq) The 2010 disparity study. The disparity study commissioned by the Empire State Development Corporation, prepared by NERA Economic Consulting, 1006 East 39th Street, Austin, Texas 78751 and dated April 29, 2010, which may be obtained at the Empire State Development website at

http://www.esd.ny.gov/MWBE/Data/NERA_NYS_Disparity_Study_Final_NEW.pdf..]

The existing 5 NYCRR Part 141 is replaced by a new 5 NYCRR Part 141 to read as follows:

Part 141. State Agency Responsibilities

Section 141.1 Purpose, scope and applicability.

(a) The purpose of this Part is to establish standards, criteria, and procedures by which State agencies set annual goals for direct and indirect contracting opportunities with certified minority- and women-owned business enterprises, and the processes by which these master goal plans are submitted, including what information needs to be reported, and procedures and consequences for State agencies that fail to meet their goals without a good faith effort to maximize contractual opportunities for certified enterprises.

141.2. Annual State Agency-Specific Goals.

(a) Each State agency shall develop and adopt agency-specific goals in accordance with Section 313(1-b) of the Executive Law.

(b) Agency-specific goals shall be reflected in the State agency's master goal plan and any subsequent updates to the master goal plan for the inclusion of certified (1) minority-owned business enterprises, (2) women-owned business enterprises and (3) minority- and women-owned business enterprises with justifications for such goals.

(c) Agency-specific goals shall be set upon a review of the scope, character and relevant expenditures associated with the State contracts that are expected to be let or performed during

the relevant fiscal year and shall be based on specific factors concerning said State contracts, which shall include, where applicable, the following:

(1) Statewide availability of minority-and women-owned business enterprises for construction, construction related services, non-construction related services and commodities contained within the Disparity Study and section 313(1) of article 15-A of the Executive Law;

(2) Statewide disparities of minority- or women-owned business participation in state contracting for construction, construction related services, non-construction related services or commodities that the agency expects to contract for, as reflected in the Disparity Study;

(3) The availability of certified minority-and women-owned business enterprises for the State agency's State contracts found in the Directory of Certified Minority- and Women-Owned Businesses (<https://ny.newnycontracts.com>);

(4) The geographic location(s) of the performance of the State agency's contracts;

(5) The extent to which geography is material to the performance of the State contract and the ability of certified minority- and women-owned business enterprises that are located outside of the geographic location(s) to perform on State contracts notwithstanding their location; and

(6) Such other factors as the State agency can specifically delineate and justify with supporting facts and documentation.

(d) Agency-specific goals shall be established on a State fiscal year basis or, where the State agency operates on a different fiscal year and upon the approval of the director, the State agency's fiscal year.

141.3 Master Goal Plan.

(a) Each State agency is responsible for and required to have an active master goal plan on file with the division.

(b) In the event a State agency is deficient with regard to the requirement set forth in subdivision (a) of this section, the subject State agency shall take affirmative measures to submit a master goal plan to the division within thirty (30) days of receipt of a written notice of such a deficiency.

(c) Such master goal plan shall include the following:

(1) Agency-specific goals set pursuant to section 141.2 of this Part for minority-owned business enterprises; women-owned business enterprises; and minority-and women-owned business enterprises;

(2) Agency-specific goals expressed as a percentage of aggregate agency expenditures, specifically including each of the following contracting categories, or in limited circumstances due to administrative necessity, other such categories established by the director, referenced in or pursuant to the Disparity Study:

(i) construction;

(ii) construction related services;

(iii) non-construction related services; and

(iv) commodities;

(3) A description of any practices, procedures, strategies or actions, in addition to those referenced in these regulations, that may be implemented by the agency to ensure maximum feasible participation by certified minority- and women-owned business enterprises in State contracts;

(4) A list of personnel responsible for the implementation of article 15-A of the Executive Law, which shall include their title, a description of their responsibilities, the percentage of their time allocated to implementation of article 15-A of the Executive Law and the State agency organization chart showing lines of authority and reporting between listed personnel and senior executive staff;

(5) Any other applicable appropriation and expenditure which may not be subject to goals, but that the State agency deems relevant or necessary to the promotion and participation of minority- and women-owned business enterprises in state procurement; and

(6) Such other information that a State agency deems relevant or necessary to its master goal plan.

(d) The master goal plan shall be the basis for each State agency's prospective efforts, practices and procedures to reasonably achieve the maximum feasible participation of minority-and women-owned business enterprises in the State agency's procurement.

141.4 State agency Master Goal Plan submission procedure.

- (a) All state agencies subject to article 15-A of the Executive Law shall submit and/or have an active Master Goal Plan in force and on file with the division.
- (b) The director shall make a copy of the Disparity Study available on the division's website.
- (c) Each state agency shall submit a master goal plan or an update to the master goal plan, pursuant to subdivision (e) of this section, to the director on or before January 15 of each year, or at such time determined by the director pursuant to section 141.5(c) of this Part, in such form as may be required by the director.
- (d) The director may, in limited instances where exigent circumstances warrant such a measure and upon the approval of the chief diversity officer, require a State agency to submit an interim master goal plan or an interim update to the master goal plan on a date certain and such plan shall be in effect until such time as the director has received and approved a master goal plan pursuant to subdivision (c) of this section and section 141.5(b) of this Part, respectively.
- (e) In instances where a State agency has an accepted master goal plan on file with the division and such State agency is in good standing with the division regarding its good faith efforts to meet the maximum feasible portion of its agency-specific goals as outlined therein, the director may, at his or her discretion, permit a State agency to submit an update to the master goal plan in lieu of a submission of a new master goal plan. Notwithstanding the foregoing, a new master goal plan must be submitted to the division by each State agency a minimum of once every four
- (4) years.
- (f) Any agency that refuses or fails to submit a master goal plan pursuant to this section shall be deemed to have failed to meet its good faith standard pursuant to section 313 of the Executive Law and shall be referred to the chief diversity officer for appropriate action.

141.5 State Agency Master Goal Plan Review.

- (a) The director shall review the agency master goal plan to determine:
- (1) whether the goals within the plan are reasonable and reflective of a process that has employed a rigorous assessment of the agency's total procurement portfolio as it relates to the participation of minority-and women-owned business enterprises in agency contracts;
- (2) whether the factual basis and supporting documentation for such goals comport with the requirements set forth in section 141.2 of this Part;

(3) whether the goals set by the State agency adequately reflect the availability of certified minority- and women-owned business enterprises for the agency's contracts; and

(4) whether other factors raised in the master goal plan have a legitimate substantive impact on the goals set by the State agency.

(b) Following the submission of a master goal plan by a State agency and review of such a master goal plan by the director, the director shall:

(1) provide written notice of the acceptance of the master goal plan;

(2) provide written notice of and reasoning for the rejection of the master goal plan and direct the agency to submit new goals in accordance with this Part and instruction by the director;

(3) provide written notice of the necessity for an extension of the time period during which the master goal plan will be reviewed; or

(4) provide written notice of the need for additional documentation or explanation, which shall be provided by the agency within a time frame as set forth by the director.

(c) Where subsequent to a State agency's submission of a master goal plan the director determines that a State agency has failed to meet its good faith standard, as defined in section 141.7 of this Part, the director shall, notwithstanding subdivision (b) of this section, direct in writing that the annual agency-specific goals, as required by 141.2 of this Part, be adjusted as set forth by the director and adopted by the subject State agency.

(d) A State agency shall resubmit its master goal plan within thirty (30) days of receipt of a notice of rejection incorporating recommended modifications or stating any reasons why modifications recommended by the director cannot be incorporated in the State agency's master goal plan.

(d) Updates to the master goal plan submitted by a State agency shall be subject to the same provisions, contained within this section, that govern the review of master goal plans.

141.6 State agency compliance reporting.

(a) Each State agency shall submit a quarterly compliance report in a form and manner required by the director. The report is submitted quarterly over the fiscal year. The four reporting quarters are April 1 – June 30 (1st quarter due July 15); July 1 – September 31 (2nd quarter due October 15); October 1 – December 31 (3rd quarter due January 15); and January 1 – March 31 (4th

quarter due April 15). The compliance report shall include the following information regarding State contracts and subcontracts awarded in the interval since the last compliance report:

(1) the number of State contracts awarded, the maximum dollar amount obligated pursuant to those contracts, and total expenditures pursuant to all such contracts;

(2) the number of State contracts awarded to certified minority- or women-owned business enterprises, the maximum dollar amount obligated pursuant to all those contracts, and the total expenditures made pursuant to all such contracts;

(3) the number of State contracts awarded which include a utilization plan for business participation by certified minority- or women-owned business enterprises as subcontractors, the maximum amount obligated pursuant to those contracts, and the total expenditures made pursuant to all such contracts, and the percentage of those expenditures awarded pursuant to certified minority- and women-owned business enterprises;

(4) the number of State contracts awarded upon which a waiver was granted from goals required by the contracts for business participation by certified minority- or women-owned business enterprises, and the maximum amount obligated pursuant to those contracts as well as a summary of the waivers;

(5) the number of State contracts awarded which required goals for employment of minority group members and women;

(6) the number of State contracts awarded for which waivers of employment goals required by the contracts have been granted;

(7) a justification of any waivers granted pursuant to paragraphs (4) and (6) of this section;

(8) a statement of whether it is in compliance with its agency goal plan based on information provided in the compliance report, and if it is not in compliance with its agency goal plan, a description of the actions which will be taken to comply with the State agency goal plan;

(9) whether the State agency has been required to prepare a remedial plan and, if so, the plan (attached as an exhibit) and the extent to which the agency has complied with each element of the plan; and

(10) any additional information relevant or necessary to demonstrate the State agency's compliance for utilization of certified minority- and women-owned business enterprises in its contracts or procurement practices.

(b) Each State agency required to submit an annual report to the governor and legislature pursuant to section one hundred sixty-four of the executive law shall include its annual goals for contracts with certified minority- and women-owned business enterprises; the number and dollar amount of actual contracts and subcontracts issued to certified minority- and women-owned business enterprises; and, a summary of all waivers of the requirements of subdivisions six and seven of section three hundred thirteen of the Executive Law allowed by the reporting agency during the preceding year, including a description of the basis of the waiver request and the rationale for granting such waiver. Each State agency shall also include in such annual report whether or not it has been required to prepare a remedial plan (attached as an exhibit), and, if so, the plan and the extent to which the State agency has complied with each element of the plan.

141.7 State Agencies' good faith efforts.

(a) State agencies shall make a good faith effort to meet the maximum feasible portion of the State agency's goals adopted pursuant to this title.

(b) To determine whether the State agency has exercised good faith, the director must consider the following:

(1) whether there are certified minority- and/or women-owned business enterprises that could participate in the type of procurement opportunities that the agency has to offer as prime contractors or subcontractors;

(2) whether the State agency has attempted to unbundle State contracts and solicit bids from the certified minority- and women-owned businesses;

(3) whether there are certified minority- and/or women owned business enterprises, located outside of the regions in which State contracts are to be performed, that could participate in procurement opportunities;

(4) whether the state agency has considered encouraging joint ventures, teaming agreements, partnerships, or other similar arrangements between prime contractors and certified minority and women owned business enterprises to participate in the State agency's procurement opportunities;

(5) the number of opportunities that the State agency had to make discretionary purchases from certified minority- and women-owned business enterprises versus the number of times the State

agency actually made discretionary purchases from certified minority- and women-owned business enterprises;

(6) the amounts paid to certified minority- and women-owned business enterprises as a result of State agency's discretionary purchasing;

(7) whether the State agency developed selective bidder lists that included certified minority- and/or women-owned business enterprises;

(8) whether the State agency has processes and procedures in place to ensure that it has assessed each State contract for certified minority- and women-owned business enterprise contract goals as required by section 142.2 of these regulations;

(9) whether the State agency's practices and procedures comport with article 15-A of the Executive Law and Part 142 of these regulations with respect to utilization plans, utilization reports and waivers.

(10) whether the State agency has submitted compliance reports pursuant to section 141.6 of this Part; and

(11) any other information submitted by the State agency or other criteria that the director deems relevant to determining whether the State agency exercised good faith, including but not limited to, the agency's compliance with the provisions of article 15-A of the Executive Law and these regulations.

141.8 State agency remediation.

(a) Each State agency that substantially fails to meet the agency-specific goals prescribed in its most recently filed master goal plan or update to the master goal plan shall be required to submit a remedial action plan to the director to remedy such failure.

(b) Such remedial action plan shall, at a minimum, identify the factors that contributed to the State agency's substantial failure to meet its agency-specific goals and outline strategies, practices, procedures and measures that the State agency will employ to reasonably meet the maximum feasible portion of the agency-specific goals.

(c) If it is determined by the director that any State agency has failed to act in good faith to implement the remedial action plan, within one year, the director shall provide written notice of

such a finding, which shall be publicly available, and direct implementation of the following affirmative measures, as appropriate:

(1) expansion of sufficient and effective solicitation efforts to certified minority- and women-owned business enterprises;

(2) review of all procurement opportunities to determine whether procurements can be unbundled into smaller quantities that may expand the participation of certified minority- and women-owned business enterprises;

(3) elimination of extended experience, capitalization requirements, or bonding requirements, where feasible, as a means to expand participation by certified minority- and women-owned business enterprises;

(4) identification of specific expenditures as particularly attractive or appropriate for participation by certified minority- and women-owned business enterprises; and

(5) maximization of the number of awards made to certified minority- and women-owned business enterprises pursuant to section 163(6) of the State Finance Law.

(d) Upon a finding by the director that a State agency has failed to take affirmative measures to implement the remedial action plan and to follow any of the remedial actions set forth by the director, and in the absence of any objective progress towards the State agency's goals, the director may require that some or all of the State agency's procurements, for a specified period of time, be placed under the direction and control of another State agency or agencies.

The existing 5 NYCRR Part 142 is replaced by a new 5 NYCRR Part 142 to read as follows:

Part 142. Requirements and procedures regarding participation by certified minority- and women-owned business enterprises on State contracts.

Section 142.1 Purpose, scope and applicability.

(a) The purpose of this Part is to provide standards, criteria and procedures for establishing contract goals; to regulate, prepare, submit, and review utilization plans, to prescribe the elements of a contractor's good faith efforts to be reviewed when a waiver of goals is requested, and to provide procedures for evaluating compliance and resolving disputes related to participation by certified minority- and women-owned business enterprises on State contracts.

(b) This Part shall also provide standards, criteria and procedures relating to the awarding of State contracts. Such standards, criteria and procedures shall relate to the past, present and prospective use of certified minority and women-owned business enterprises as a subcontractor, joint ventures or partners and the establishment of quantitative factors for certified minority-and-women-owned business enterprise status.

142.2 Establishing contract goals and identifying subcontract opportunities for certified businesses.

(a) Where practical, feasible and appropriate, State agencies shall establish the following goals on all State contracts:

(1) overall minority-and women-owned business enterprises;

(2) minority-owned business enterprises; and

(3) women-owned business enterprises.

(b) State agencies shall notify contractors in bid documents, requests for proposals, contract announcements advertisements or otherwise in writing of the goals established on State contracts.

(c) State agencies shall provide an electronic link to the current list of certified minority- and women-owned business enterprises to each prospective contractor.

(d) In determining appropriate goals for a particular State contract, State agencies shall give consideration to the following factors:

(1) the contract and subcontract scope(s) of work;

(2) the potential subcontract opportunities available in the prime contract;

(3) the relevant availability data contained within the disparity study with respect to the scope of the contract and potential subcontracting opportunities;

(4) the number and types of certified minority-and women-owned business enterprises found in the directory of certified minority- and women-owned businesses available to perform the State contract work;

(5) the geographic location of the contract performance;

(6) the extent to which geography is material to the performance of the contract;

(7) the ability of certified minority- and women-owned enterprises located outside of the geographic location of contract performance, notwithstanding the regional location of the certified enterprise, to perform on the State contract;

(8) the total dollar value of the work required by the State contract in relation to the dollar value of the subcontracting opportunities;

(9) the relationship of the monetary size and term of the State contract to the monetary size and term of the project for which the State contract is awarded; and

(10) the agency's annual agency-specific goal established pursuant to section 141.2 of these regulations.

(e) In the event that a State contract is entered into on an emergency basis or where an amendment or change order has been added to a State contract providing for a total expenditure in excess of \$25,000, the contracting agency may require the contractor to submit a utilization plan and to comply with the post award requirements of this Part during the life of the contract.

142.3 Diversity Practices, bidding and award considerations.

(a) The contracting State agency shall determine whether it is practical, feasible and appropriate to include in the evaluation of bids or proposals the diversity practices of all contractors making submissions for the award of any State contract that is:

(1) awarded on the basis of best value, or otherwise awarded as a response to a request for a proposal and/or a request for qualifications; and

(2) anticipated to result in an award of two hundred fifty thousand dollars (\$250,000) or greater; and

(3) not a contract based on lowest price.

(b) A determination by a contracting agency as to whether it is practical, feasible and appropriate to assess the diversity practices of all contractors making such submissions shall include consideration of the following:

(1) nature of the labor, services, supplies, equipment and materials being procured;

(2) method of procurement undertaken to make the award;

and

(3) availability of certified minority- and women-owned business enterprises for contract performance.

(c) If a contracting agency makes a determination that the evaluation of diversity practices is not practicable, feasible, or appropriate for a subject State contract, such determination shall be supported by findings in writing.

(d) After a determination has been made to assess the diversity practices of prime contractors submitting bids or proposals in connection with the award of a State contract, the contracting agency shall require the submission of diversity practices information as part of a contractor's bid or proposal and establish a quantitative factor for scoring diversity practices.

(e) Diversity practices information submitted for assessment by all contractors must be fully documented and, if required by the director, subject to audit. Such submissions shall include, but not necessarily be limited to, the following:

(1) The percentage of such prime contractor's gross revenues involving the use of minority- and/or women-owned business enterprise subcontractors for servicing clients and/or manufacturing products and/or performing on contracts in the contractor's prior fiscal year of business activity;

(2) The percentage of such contractor's gross revenues involving the use of joint ventures, partnerships, or other similar arrangements with certified minority- and/or women-owned business enterprises in the contractor's prior year of business activity;

(3) The percentage of such contractors' gross revenues that the contractor paid to certified minority- and/or women-owned business enterprise subcontractors and paid to certified minority- and/or women-owned business enterprise joint ventures, partnerships, or other similar arrangements;

(4) The percentage of such contractor's non-contract related/overhead expenses for the prior fiscal year of business activity that were certified minority- and/or women-owned business enterprise expenditures;

(5) Any training or mentoring programs provided for certified minority- and/or women-owned business enterprises by such contractor.

(6) Any supplier and subcontractor diversity goals involved in such contractor's procurements.

(7) Any established goals for certified minority- and/or women-owned business enterprise suppliers or a total purchasing budget allocated to certified minority- and/or women-owned business suppliers by such contractors.

(8) The utilization plan for the award as required by section 142.4 of this Part;
and

(9) Any other information that demonstrates such contractor's commitment to diversity practices.

(f) The director shall provide each State agency with numerical guidelines for assessing a contractor's past, present and prospective practices and policies with respect to:

(1) utilizing certified minority-and women-owned business enterprises in contracts awarded by State agencies, other public entities or private sector companies, as subcontractors and suppliers;

(2) entering into partnerships, joint ventures or other similar arrangements with certified minority-and women-owned business enterprises as defined in this Part or other applicable federal, state, or local statutes or regulations, or certified by the certifying entities recognized by the division governing an entity's utilization of minority-and women-owned business enterprises;
and

(3) any other information requested by the State agency or activities that demonstrate the contractor's commitment to a policy of diversity practices related to minority-and women-owned business enterprises.

(g) When numerical guidelines pursuant to subdivision (f) of this section or other numerical guidelines created by the State agency and submitted to and approved by the director, are used in the assessment of a response to a bid or proposal, it shall be included in the solicitation. The assessment is to be used as one of the factors in determining the award of such a contract.

(h) Nothing in this section shall prevent the director from establishing, notwithstanding subdivision (e) of this section, contract specific numerical guidelines for individual State contracts where necessary.

142.4 Utilization plans.

(a) State agencies shall require contractors to submit utilization plans for achieving contract goals established for the participation of certified minority- and women-owned business enterprises performing commercially useful functions in relation to State contracts. A form for

the utilization plan shall be provided by the State agency to the contractor for any request for bids, proposals or qualifications, or negotiated contracts, for which contract goals are established with:

- (1) bid documents where a State contract is awarded pursuant to solicitation of bids;
- (2) requests for proposals or qualifications in the case of State contracts awarded pursuant to a request for proposals or qualifications; and
- (3) proposed contracts where a State contract will be awarded pursuant to negotiation without solicitation of bids or a request for proposals.

(b) Utilization plan forms submitted by contractors shall include, at a minimum, the following required information:

- (1) the name, address and telephone number of the contractor;
- (2) the Federal identification number of the contractor;
- (3) the names, addresses, and federal identification numbers of certified minority- and women-owned business enterprises which the contractor intends to use to perform a commercially useful function on the State contract and a description of the contract scope of work which the contractor intends to structure to achieve maximum feasible participation pursuant to the prescribed State contract goals;
- (4) the estimated or, if known, actual dollar amounts to be paid to and performance dates of each component of a State contract which the contractor intends to be performed by a certified minority- or woman-owned business enterprise; and
- (5) a statement that the utilization of certified minority- and women-owned business enterprises for non-commercially useful functions is strictly prohibited.

(c) In the event that a contractor responding to a State agency's solicitation is a joint venture, teaming agreement, or other similar arrangement that includes a certified minority- and women-owned business enterprise, such a contractor must submit the following to the State agency for its review and approval:

- (1) The name, address, telephone number, and federal identification of each partner or party to the agreement;
- (2) The federal identification number of the joint venture or entity established to respond to the solicitation, if applicable;

(3) A copy of the joint venture, teaming agreement, or other similar arrangement, which describes the percentage of interest owned by each party to the agreement and the value added by each party; and

(4) A copy of the mentor-protégé agreement between the parties, if applicable, and if not described in the joint venture, teaming agreement, or other similar arrangement.

(d) Certified minority- or women-owned business enterprises may list themselves on utilization plans toward the achievement of prescribed certified minority- and women-owned business enterprise contract goals.

(e) Proceeds from State contracts that are paid to certified minority- and women-owned business enterprises that are not performing commercially useful functions shall be disregarded by State agencies for utilization purposes.

142.5 Posting of utilization plans.

(a) Upon execution of a State contract, State agencies shall post the utilization plan or waiver, if granted, and the following information on the State agency's website within ten (10) days after approval by a State agency:

(1) the name and address of the contractor

(2) the contract number;

(3) the project number, if applicable;

(4) the contract award date;

(5) the estimated date of completion;

(6) the amount obligated under the contract;

(7) a description of work required by the State contract as provided to the Comptroller of the State, where applicable;

(8) the name and address of certified enterprises referenced in the utilization plan and contract work they shall perform; and

(9) a description of any waivers granted.

(b) After commencement of contract work, any waivers of compliance issued by the contracting agency or modifications to the utilization plan shall be posted on the State agency's website within ten (10) days of the contracting agency making such a decision.

142.6 Submission and review of utilization plans.

(a) In the case of a request for proposals, request for qualifications, or negotiated State contracts, for which contract goals have been set, the time for submitting the utilization plan shall be upon submission of any proposal, qualifications, or negotiated contract. The State agency may waive or modify this requirement by sending a written notice to the director with an explanation ten (10) days before solicitations are issued.

(b) In the case of any bid submission, utilization plans shall be submitted after the opening of bids, but in no case more than ten (10) business days after the contractor receives notice from a State agency that the contractor has submitted a low bid, provided the agency may adopt a longer time period for submission of utilization plans as to all or particular categories of its contracts upon filing of such period and any supporting justification with the director, and subject to rejection or modification by the director. Any such modification or rejection shall apply to contract solicitations on or after the date of the rejection or modification.

(c) The State agency shall review a utilization plan submitted by a contractor and issue a written notice of acceptance or deficiency regarding the utilization plan no later than twenty (20) days after receipt of the utilization plan, and prior to the execution of the contract resulting from said procurement. A state agency may accept a utilization plan if:

(1) the contract goals, as determined by the State agency in the solicitation or bid, are to be provided by one or more certified minority- and/or women-owned business enterprises;

(2) the contractor submits a utilization plan which only partially satisfies the contract goals set forth in the solicitation, but is supported by the contractor's documented good faith efforts to submit a utilization plan as requested;

(3) the contractor is a joint venture, teaming agreement, or other similar arrangement, with a certified minority- or women-owned business enterprise whose value added or participation is equal to the percentage of the contract goals set forth in the solicitation;

(4) the contractor submits a mentor-protégé agreement acceptable to the agency, which does not meet the goals set forth in the solicitation, but reflects an investment by the mentor in the protégé roughly equal to the difference between the contract goals set forth in the solicitation and the percentage of value added participation provided by the protégé.

(d) The notice of deficiency regarding the utilization plan shall include the following information:

(1) a statement that the contract shall not be awarded until a utilization plan has been approved or a waiver granted;

(2) a specific request for the reasons why any certified minority- or women-owned business enterprise was not selected to perform the scope of work which the State agency has determined can be reasonably structured by the contractor into subcontract(s) or other component(s) for purposes of complying with the State contract certified enterprise goal(s); and

(3) any other facts relevant to the utilization plan.

(e) Unless otherwise specified in the information, instructions or requirements and any addenda provided to contractors for purposes of soliciting bids or proposals, a contractor must provide a State agency with a written remedy in response to a notice of deficiency within seven (7) business days of its receipt.

(f) If the contractor's written remedy to a notice of deficiency is not timely provided or if the written notice is found by the State agency to be inadequate such a failure to remedy the deficiency may be grounds for disqualification for non-responsiveness or the State agency may notify the contractor and request the contractor to submit a waiver form within five (5) business days. Failure to file the waiver form in a timely manner may be grounds for disqualification of the bid for non-responsiveness.

(g) Failure of the contractor to comply with the requirements of section 142.6(e) may result in the disqualification of the contractor under this Part.

(h) The time requirements of this section shall apply unless otherwise agreed to in writing by the State agency and the contractor.

(i) If a contractor changes its utilization plan after submission, it shall be required to notify the State agency in writing of such change and obtain approval from the State agency in accordance with this section and section 142.8 of this Part.

142.7 Waivers.

(a) A State agency shall not grant any automatic waivers of goal requirements on a State contract but may grant a partial or total waiver of goal requirements established on a State contract only

upon the submission of a waiver form by a contractor, documenting good faith efforts, as defined in Section 142.8, by the contractor to meet the goal requirements of the State contract, and in consideration of the following factors:

- (1) the number and types of certified minority- or women-owned business enterprises available to perform on any subcontractable scopes of the contract;
 - (2) the total dollar value of the State contract;
 - (3) the contract scope of work to be performed;
 - (4) the project size;
 - (5) the project term;
 - (6) the availability of other business enterprises located in the region qualified to do the work to be performed;
 - (7) the ability of certified minority- and women-owned business enterprises located outside the region to perform the State contract; and
 - (8) the extent to which contractor's own actions, including but not limited to, any failure by contractor to discharge the contractor's duties pursuant to this Part or article 15-A of the Executive Law, contributed to contractor's inability to meet the maximum feasible portion of the contract goals.
- (b) Requests for a partial or total waiver of goal requirements established on a State contract made prior to the award of the contract may be made simultaneously with the submission of the utilization plan for that State contract. If a contractor is found non-responsive or non-responsible by a State agency, the request for a waiver shall be deemed moot.
- (c) Requests for a partial or total waiver made subsequent to award of a State contract may be made at any time during the term of the State contract but prior to the submission of a request for final payment on that contract.
- (d) Forms for requests of a partial or total waiver of goal requirements established on a State contract, shall include a request for the following information, where applicable:
- (1) the names of general circulation, trade association and minority- and women-oriented publications in which bids were solicited for purposes of complying with goal requirements established for certified minority- and women-owned business enterprise participation;

(2) the dates for which bid solicitations for certified minority- and women- owned business participation were published in any of the publications named pursuant to paragraph (1) of this subdivision and the text of the bid solicitation;

(3) a list of certified minority- and women-owned business enterprises appearing in the directory which were solicited in writing to provide bids for purposes of complying with a State agency's goal requirements for certified minority- and women-owned business enterprise participation;

(4) proof of dates on which such solicitations were made in writing and copies of solicitations made, or a sample copy of the solicitation if an identical solicitation was made of all certified minority- and women-owned business enterprises;

(5) copies of responses made by certified minority- and women-owned business enterprises to solicitations made by the contractor;

(6) a description of any contract documents, plans or specifications made available to certified minority- and women-owned business enterprises for purposes of soliciting their bids, and the dates and manner in which these documents were made available;

(7) documentation of any negotiations between the contractor and/or certified minority- and women-owned business enterprises undertaken for purposes of complying with goal requirements established for certified minority- and women-owned business enterprise participation;

(8) any other information determined relevant by the State agency or the contractor; and

(9) a statement setting forth the contractor's basis for requesting a partial or total waiver.

142.8 Contractor's Efforts to Utilize Certified Business Enterprises.

(a) Contractors must document their good faith efforts toward utilizing certified minority- and women-owned business enterprises, including but not limited to, those identified within a utilization plan. Such documented efforts, shall include, at a minimum:

(1) Copies of its solicitations of certified minority- and women-owned business enterprises and any responses thereto;

(2) If responses to the contractor's solicitations were received, but a certified minority- or woman-owned business enterprise was not selected, the specific reasons that such enterprise was not selected;

(3) Copies of any advertisements for participation by certified minority- and women-owned business enterprises timely published in appropriate general circulation, trade and minority- or women-oriented publications, together with the listing(s) and date(s) of the publication of such advertisements;

(4) The dates of attendance at any pre-bid, pre-award, or other meetings, if any, scheduled by the State agency awarding the State contract, with certified minority- and women-owned business enterprises which the State agency determined were capable of performing the State contract scope of work for the purpose of fulfilling the contract participation goals;

(5) Information describing the specific steps undertaken to reasonably structure the contract scope of work for the purpose of subcontracting with, or obtaining supplies from, certified minority- and women-owned business enterprises.

(b) In addition to the information provided by the contractor in subdivision (a) above, the State agency may also consider the following to determine whether the contractor has demonstrated good faith efforts:

(1) where applicable, whether the contractor submitted an amended utilization plan consistent with the subcontract or supplier opportunities in the contract;

(2) the number of certified minority- and women-owned business enterprises in the region listed in the directory of certified businesses that could, in the judgment of the State agency, perform work required by the State contract scope of work;

(3) the actions taken by the contractor to contact and assess the ability of certified minority- and women-owned business enterprises located outside of the region in which the State contract scope of work is to be performed to participate on the State contract;

(4) whether the contractor provided relevant plans, specifications or terms and conditions to certified minority- and women-owned business enterprises sufficiently in advance to enable them to prepare an informed response to a contractor request for participation as a subcontractor or supplier;

(5) the terms and conditions of any subcontract or provision of suppliers offered to certified minority- or women-owned business enterprises and a comparison of such terms and conditions with those offered in the ordinary course of the contractor's business and to other subcontractors or suppliers of the contractor;

(6) whether the contractor offered to make up any inability to comply with the certified minority- and women-owned business enterprises goals in the subject State contract in other State contracts being performed or awarded to the contractor;

(7) the extent to which contractor's own actions, including but not limited to, any failure by contractor to discharge contractor's duties pursuant to this Part or article 15-A of the Executive Law, contributed to contractor's inability to meet the maximum feasible portion of the contract goals;

(8) whether the contractor knowingly utilized one or more certified minority- and/or women-owned business enterprises, in the performance of the subject State contract, that contractor knew or reasonably should have known could not perform a commercially useful function.

(9) whether the contractor submitted compliance reports pursuant to section 142.11 of this Part, which identified certified minority- and/or women-owned business enterprises that contractor knew or reasonably should have known did not perform a commercially useful function on a State contract on which goals were assigned pursuant to section 142.2 of this Part.

and

(10) any other information that is relevant or appropriate to determining whether the contractor has demonstrated a good faith effort.

142.9 Contractor Disqualification.

(a) Where a State agency determines, after having given notice of deficiency pursuant to section 142.6(c) of this Part, that a contractor has failed to submit an acceptable utilization plan or satisfactorily document its good faith efforts, the State agency may proceed with the next ranked bidder: (i) twelve (12) days after sending a written notice of deficiency, as specified in section 142.6 of this Part, to the contractor, and the State agency has not received a request for an administrative hearing from the contractor, (ii) after the mailing of a notice of disqualification, specifying the grounds for such disqualification, provided that the contractor has not filed a complaint with the director, or (iii) after receiving a written notification of a resolution from the director, or a decision of the division's hearing officer. The State agency shall serve a copy of its complaint upon the contractor by personal service or certified mail, return receipt requested.

(b) A contractor who has received a written notice of disqualification may, within five (5) days of receipt of such a notice, file a complaint with the director pursuant to Section 316 of the Executive Law. The contractor shall serve a copy of its complaint upon the director and the State agency by personal service or certified mail, return receipt requested.

142.10 Contractor compliance reporting.

(a) State agencies are responsible for determining compliance by contractors with goals established in State contracts.

(b) A State agency may determine that a contractor is complying with contract goals set forth in the utilization plan if:

(1) the contractor is a certified minority- or women-owned business enterprise and is responsible for one hundred percent of the contract performance;

(2) the State agency has verified that the contract goals are being achieved with certified, value added enterprises; or

(3) a review of contractor compliance reports and the determination of compliance is consistent with procedures or actions described in the State agency's master goal plan.

142.11 Contractor compliance reports.

(a) Contractor compliance reports shall be submitted by contractors with respect to State contracts for which a utilization plan was required and approved by a State agency.

(b) Contractor compliance reports shall be filed at intervals required by information, instructions or requirements pursuant to which bids and proposals have been solicited, or the terms and conditions of a State contract awarded pursuant to negotiation.

(c) A contractor compliance report shall include, but not be limited to the following information:

(1) the name, address and telephone number of each certified minority- or woman-owned business enterprise the contractor is using or intends to use to comply with the utilization plan;

(2) a brief description of the contract scope of work to be performed for the contractor by each certified minority- or woman-owned business enterprise and the scheduled dates for performance;

(3) a statement of whether the contractor has a written agreement with each certified minority- or woman-owned business enterprise, and if requested, copies of such agreements, the contractor is using or intends to use;

(4) the actual total cost of the contract scope of work to be performed by each certified minority- or woman-owned business enterprise for the contract; and

(5) the actual amounts of any payments made by the contractor to each certified minority- or woman-owned business enterprise as of the date the compliance report was submitted.

(d) Proceeds from State contracts that are paid to certified minority- and women-owned business enterprises that are not performing commercially useful functions shall be disregarded by State agencies for utilization purposes.

142.12 Contractor and State agency complaints.

(a) Subsequent to the award of a State contract to a contractor that becomes deficient with regard to its utilization plan, the contractor may file a complaint with the director pursuant to Executive Law, section 316, by personal service or certified mail, return receipt requested, provided that the complaint is filed within twenty (20) days following paragraphs (1), (2), or (3) of this subdivision. The complaint should state the reasons for the complaint, together with a demand for relief and include the following information:

(1) the contractor's receipt of a written determination by a State agency that the contractor is not entitled to a partial or full waiver of the goals established in a State contract for participation by certified minority- and women-owned business enterprises; or

(2) the contractor's receipt of a written determination by a State agency that the contractor has not acted in good faith, has failed, is failing, or is refusing to comply with goals; or

(3) twenty (20) days have passed from the date of the State agency's receiving a written request from the contractor, sent by certified mail, return receipt requested, for a partial or total waiver of goal requirements for participation by certified minority- and women-owned business enterprises, and no written determination has been issued by the State agency.

(b) Within twenty (20) days of the State agency determination that the contractor has not acted in good faith, has failed, is failing, or is refusing to comply with goals for participation by certified

minority- and/or women-owned business enterprises established in the State contract, a State agency may

(1) after giving contractor an opportunity to be heard, make a determination that contractor has failed to meet the contract goals and assess liquidated or such other damages as were identified in the contract; or

(2) file a complaint with the director, pursuant to Executive Law, section 316, by personal service or certified mail, return receipt requested, accompanied by the reasons for the State agency's determination for which the complaint is filed, together with a demand for relief, such as disbarment, damages or fines pursuant to the terms.

(c) A copy of any complaints filed with the director shall also either be personally served or mailed certified mail, return receipt requested, by the party making the complaint to the party against whom the complaint is being filed.

(d) Upon receipt by the director of a complaint, the party against whom the complaint has been filed shall be provided with an opportunity to respond to the complaint. If within thirty (30) days of receipt of the complaint, the director is unable to resolve the complaint to the satisfaction of the State agency and the contractor, the complaint shall be referred to the division's hearing officer for a hearing. The hearing shall be held in accordance with the procedures outlined in section 145.1 of this Title with the complainant following the process required of a petitioner and the state agency following the process required of the director and the division.

(e) Upon conclusion of the administrative hearing, the hearing officer shall submit to the director his or her decision regarding the alleged violation of the contract or the refusal of the State agency to grant a waiver request by the contractor. The decision of the hearing officer with respect to an alleged violation of the State contract or the refusal of the State agency to grant a waiver shall be final and may only be vacated or modified as provided in article seventy-eight of the civil practice law and rules upon an application made within the time provided by such article.

(f) Upon conclusion of the administrative hearing and the rendering of a decision, the hearing officer shall also recommend to the director a remedy, including, if appropriate, the imposition of sanctions, fines or penalties.

(g) The director, within ten (10) days of receipt of the decision, shall file a determination with regard to the imposition of any fines, sanctions or penalties and shall cause a copy of such

determination to be served upon the contractor by personal service or by certified mail, return receipt requested. The determination of the director as to the imposition of any fines, sanctions or penalties shall be final and may only be vacated or modified as provided in article seventy eight of the civil practice law and rules upon an application made within the time provided by such article.

142.13 Provisions in contracts; violations.

(a) Every contracting agency shall include a provision in its State contracts expressly providing that any contractor who willfully and intentionally fails to comply with the minority and women-owned participation requirements of these regulations as set forth in such State contract shall be liable to the contracting agency for liquidated or other appropriate damages, as otherwise specified in the contract, and shall provide for other appropriate remedies on account of such breach. Damages shall be calculated based on the actual cost incurred by the State agency related to the State agency's expenses for personnel, supplies and overhead related to establishing, monitoring, and reviewing certified minority- and women-owned business enterprise programmatic goals and Affirmative Action and Equal Opportunity compliance, or the amount stated in the solicitation as liquidated damages. A contracting agency that elects to proceed against a contractor for breach of contract as provided in this section shall be precluded from seeking enforcement pursuant to section three hundred sixteen of the Executive Law. The contracting agency shall, however, include a summary of all enforcement actions undertaken pursuant to this section in its annual report submitted pursuant to subdivision three of section three hundred fifteen of the Executive Law.

(b) The penalties imposed for any violation which is premised upon either a fraudulent or intentional misrepresentation by the contractor or the contractor's willful and intentional disregard of the minority and women-owned participation requirement included in the contract may include a determination that the contractor shall be ineligible to submit a bid to any contracting State agency or be awarded any State contract for a period not to exceed one year following the final determination; provided however, if a contractor has previously been determined to be ineligible to submit a bid pursuant to this section, the penalties imposed for any subsequent violation, if such violation occurs within five years of the first violation, may include

a determination that the contractor shall be ineligible to submit a bid to any contracting State agency or be awarded any State contract for a period not to exceed five years following the final determination. The division shall maintain a website listing all contractors that have been deemed ineligible to submit a bid pursuant to this section and the date after which each contractor shall once again become eligible to submit bids.

142.14 Quantitative scoring factors for State Contracts

(a) On contracts where State agencies do not assess diversity practices pursuant to section 142.3 of this Part, State agencies may establish and include a quantitative factor in the scoring of bids or proposals submitted to agencies for bidders that are certified minority-or women-owned business enterprises.

Subdivisions (a), (d), (e), and (g) of section 143.2, subdivision (a) of section 143.3, subdivisions (b), (d), and (e) of section 143.4, subdivisions (a) and (b) of section 143.5, and subdivision (f) of section 143.6 of 5 NYCRR Part 143 are amended to read as follows:

Part 143. Work Force Diversity Requirements and Procedures Regarding Equal Employment Opportunities for Minority Group Members and Women on State Contracts.

143.1 Purpose, scope, and applicability

(a) The requirements of this Part apply to all documents soliciting bids or proposals for State contracts which are issued on or after the effective date of this Part.

(b) In the event that a State contract is entered into on an emergency basis or where an amendment or change order has been added to a State contract providing for a total expenditure in excess of \$ 25,000, the contracting agency may require the contractor to submit an EEO policy statement and to comply with the post award requirements of this Part during the life of the contract.

(c) Pursuant to Executive Law, section 312(3), the requirements of this Part shall not be binding upon contractors or subcontractors in the performance of work or the provision of services or any

other activity that are unrelated, separate or distinct from the State contract as expressed by its terms.

(d) Based on the restrictions set forth in the applicability provisions of Executive Law, section 312(6), the requirements of sections 143.4 and 143.6 of this Part shall not apply to any employment outside this State or application for employment outside this State or solicitations or advertisements therefor.

143.2 General Work Force Diversity Requirements for State Agencies Awarding Contracts

(a) State agencies shall include in their [annual] master goal plan submitted pursuant to section 141.3 of this Title, steps the agency will take to implement and to ensure compliance with the EEO requirements of this Part for approval by the director. The agency shall annually provide relevant updated information as a part of the agency master goal plan [submittal] submission process.

(b) The director shall provide all contracting agencies with the labor force availability data on Federal occupational categories upon request. Contracting agencies shall include relevant portions of such data in all documents soliciting bids or proposals for State contracts or provide the data to contractors within the time frame established by the agency for a contractor's pre-award submission of an EEO policy statement and staffing plan required by section 143.2 of this Part. The director shall make efforts to assist contractors in utilizing the data to determine the expected levels of participation of minority group members and women on State contracts.

(c) In relation to the labor force availability data, the director will provide contracting agencies guidance and assistance in identifying the relevant labor force availability pool of employees based on: (1) the reasonable recruitment area for the type of job category; (2) the location of the job; and (3) consideration for selecting the optimal availability pool.

(d) State agencies shall include in all State contracts and all documents soliciting bids or proposals for State contracts the following language: (1) As to the performance of the State contract, contractors and subcontractors shall undertake or continue programs to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status. For these purposes, equal opportunity shall apply in the areas of recruitment, employment, job

assignment, promotion, upgrading, demotion, transfer, layoff, or termination and rates of pay or other forms of compensation. (2) Prior to the award of a State contract, the contractor shall submit an equal employment opportunity policy statement to the contracting agency within the time frame established by that agency. (3) As a part of the contractor's EEO policy statement, the contractor, as a precondition to entering into a valid and binding State contract, shall agree to the following in the performance of the State contract:

(i) The contractor will not discriminate against any employee or applicant for employment, will undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status, and shall make and document its conscientious and active efforts to employ and utilize minority group members and women in its work force on State contracts. (ii) The contractor shall state in all solicitations or advertisements for employees that, in the performance of the State contract, all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status;

(iii) At the request of the contracting agency, the contractor shall request each employment agency, labor union, or authorized representative of workers with which it has a collective bargaining or other agreement or understanding, to furnish a written statement that such employment agency, labor union, or representative will not discriminate, and that such union or representative will affirmatively cooperate in the implementation of the contractor's obligations herein. (4) Except for construction contracts, prior to an award of a State contract, the contractor [shall] may be required to submit to the contracting agency a staffing plan of the anticipated work force to be utilized on the State contract or, where required, information on the contractor's total work force, including apprentices, broken down by specified ethnic background, gender, and Federal occupational categories or other appropriate categories specified by the contracting agency. The form of the staffing plan shall be supplied by the contracting agency. (5) After an award of a State contract, the contractor [shall] may be required by the contracting agency to submit [to the contracting agency] a workforce utilization report to the contracting agency, in a form and manner required by the agency, of the work force actually utilized on the State contract, broken down by specified ethnic background, gender, and Federal occupational categories or other appropriate categories specified by the contracting agency.

(e) Where applicable, [The] the contractor shall include the provisions of subdivision (d) of this section in every subcontract in such a manner that the requirements of the provisions will be binding upon each subcontractor as to work in connection with the State contract, including the requirement that subcontractors shall undertake or continue existing programs of affirmative action to ensure that minority group members and women are afforded equal employment opportunities without discrimination because of race, creed, color, national origin, sex, age, disability or marital status, and, when requested, provide to the contractor information on the ethnic background, gender, and Federal occupational categories of the employees to be utilized on the State contract.

(f) To ensure compliance with the requirements of this Part, a contracting agency shall inquire of a contractor whether the work force to be utilized in the performance of the State contract can be separated out from the contractor's and/or subcontractor's total work force and where the work of the State contract is to be performed.

(g) A contracting agency may require the contractor [and any subcontractor] to submit compliance reports, pursuant to Section 143.5 of this Part, relating to their operations and implementation of their affirmative action or equal employment opportunity program in effect as of the date the State contract is executed and may require the contractor to obtain similar reports from subcontractors utilized during the contract.

(h) If a contractor or subcontractor does not have an existing affirmative action program, the contracting agency may provide to the contractor or subcontractor a model plan of an affirmative action program. Upon request, the director shall provide a contracting agency with a model plan of an affirmative action program.

(i) Upon request, the director shall provide a contracting agency with information on specific recruitment sources for minority group members and women, and contracting agencies shall make such information available to contractors.

143.3 Work Force Diversity bidding and award requirements.

(a) State agencies shall require as part of all bid requests and contract solicitations that the contractor submit to the contracting agency an EEO policy statement and, may require, a staffing plan, as described in section 143.2 of this Part. A contracting agency's approved [annual] master

goal plan may specify, with reasons, that the pre-award submission of a staffing plan will not be required for particular contracts.

(b) Prior to the award of a State contract and in the case where the work force to be utilized in the performance of the State contract cannot be separated out from the contractor's and/or subcontractor's total work force (for example, certain commodities contracts), the contractor shall, where required by the contracting agency, submit to the contracting agency, in lieu of a staffing plan, information on the contractor's and/or subcontractor's total work force broken down by ethnic background, gender, and Federal occupational categories or other appropriate categories specified by the contracting agency.

(c) A contractor's failure to submit an EEO policy statement and, where required by the contracting agency, staffing plan or total work force data shall result in the rejection of the contractor's bid or proposal, unless the contractor provides the contracting agency with a reasonable justification in writing for such failure (e.g., the failure to submit a staffing plan where a contractor has a work force of 10 employees or less), or makes a commitment to submit an EEO policy statement and a staffing plan or total work force data by a date to be specified by the contracting agency.

(d) The contracting agency shall be responsible for determining the time frames for the pre-award submission of the EEO policy statement and staffing plan or total work force data and for determining whether all bidders or only the lowest responsible bidder(s) or finalists shall be required to submit such documentation. (e) After the award of the State contract and in the case where the work force to be utilized in the performance of the State contract can be separated out from the contractor's and/or subcontractor's total work force, a contracting agency [shall] may require the contractor to submit a work force employment utilization report in a form developed by the director. In instances where such a report is required, the work force employment utilization report form shall be provided to the contractor by the contracting agency at the time of the execution of the contract. The work force utilization report shall include the following information: (1) the total number of employees performing work on the State contract; (2) for commodities, services/consulting, and professional construction consultant contracts (including not-for-profit contracts within those industries), the contractor's and all subcontractor's work force on the State contract broken down by specified ethnic background, gender, and Federal occupational categories; and (3) for construction contracts, the hours a contractor's and all

subcontractor's employees worked on activities related to that contract, and a breakdown of those hours by ethnic background, gender and the construction related job titles that fall within relevant Federal occupational categories. (f) For construction contracts, a contractor shall submit to the contracting agency a work force utilization report on a monthly basis throughout the life of the contract. (g) For all other contracts where the work force to be utilized in the performance of the State contract can be separated out from the contractor's and/or subcontractor's total work force, the contracting agency shall require a contractor to submit work force utilization reports on a quarterly basis throughout the life of the contract when the contractor's and/or subcontractor's work force on the State contract changes. In the case where the contractor's and/or subcontractor's work force does not change within the quarterly period, the contractor shall so notify the contracting agency in writing. (h) After an award of the State contract and in the case where the work force to be utilized in the performance of the State contract cannot be separated out from the contractor's and/or subcontractor's total work force, the contractor [shall] may submit to the contracting agency information on the contractor's and/or subcontractor's total work force broken down by specified ethnic background, gender, and Federal occupational categories. Such total work force data [shall] may be submitted by the contractor to the contracting agency on a semi-annual basis during the life of the particular State contract or during the course of an extended and ongoing contractual relationship involving various State contracts entered into between the contractor and contracting agency. (i) For all State contracts that are bid and awarded by the Office of General Services, the Office of General Services shall be solely responsible for requiring contractors to submit work force employment utilization reports and all other required information.

143.4 Contractor Work Force Diversity compliance

(a) Contracting agencies shall be responsible for monitoring a contractor's compliance with the requirements of this Part.

(b) In addition to general monitoring of contract performance, contracting agencies shall be responsible for conducting in-depth compliance reviews on selected State contracts during the course of the year. In addition, the number of compliance reviews a contracting agency shall conduct will be established in the agency's approved master goal plan [annual goal plan] and

may be based upon such factors as the number and type of contracts the State agency awards annually.

(c) In determining which contracts should be subject to an in-depth compliance review, a contracting agency shall, in part, base its determination on the results of its comparison of the ratios of women and minority group members in a contractor's work force to the relevant availability and expected levels of participation of minority group members and women on State contracts.

(d) A contracting agency shall notify the contractor in writing of the State agency's intent to conduct a compliance review ten (10) days prior to commencing the review. The contractor shall submit and/or have available for inspection at the time of the review books, records, payroll records, and other relevant documentation of the contractor's employment of minority group members and women on a specific State contract for the period to be reviewed.

(e) If the contractor fails to provide the information requested by the State agency within [10] ten (10) days of the request, such failure shall be deemed a material breach of contract and subject to an administrative hearing pursuant to Section 143.6 of these regulations or any other relief to which the State agency is entitled.

(f) A contracting agency shall review such documentation thoroughly to determine whether the contractor made conscientious and active efforts to employ and utilize minority group members and women on the State contract. In making its determination, the contracting agency shall evaluate the contractor's efforts based upon consideration of the following factors: (1) whether the contractor established and maintained a current list of recruitment sources for minority group members and women, and whether the contractor provided written notification to such recruitment sources that the contractor had employment opportunities at the time such opportunities became available;

(2) whether the contractor sent letters to recruiting sources, labor unions, or authorized representatives of workers with which the contractor has a collective bargaining or other agreement or understanding requesting their assistance in locating minority group members and women for employment;

(3) whether the contractor disseminated its equal employment opportunity policy by including it in any advertising in the news media and, in particular, minority and women news media;

- (4) whether the contractor notified other contractors and subcontractors with whom it does or anticipated doing business to discuss the contractor's equal employment opportunity policy;
- (5) whether internal procedures exist for, at minimum, annual dissemination of the contractor's equal employment opportunity policy to employees, specifically to employees having any responsibility for hiring, assignment, layoff, termination, or other employment decisions;
- (6) whether the contractor encourages and utilizes minority group members and women employees to assist in recruiting other employees; and
- (7) whether the contractor has apprentice training programs approved by the New York State Department of Labor which provide for training and hiring of minority group members and women.

143.5 Work Force Diversity reporting requirements for contracting agencies.

(a) The director may require [Contracting] contracting agencies [shall] to report to the division on the information contained in the work force employment utilization reports in a form and manner required by the director quarterly on the 15th day of January, April, July, and October of each year. The contracting agency's report shall include, but is not limited to, the following information regarding the State contracts for which the State agency received work force utilization reports on during the preceding quarterly interval:

- (1) an aggregation, by location of work, of the work forces employed on all State contracts in the industries of commodities, services/consulting, and professional construction consulting broken down by ethnic background, gender and Federal occupational categories;
- (2) for construction contracts, an aggregation, by location of work, of the hours worked during the reporting period on activities related to those contracts, and a breakdown of those hours by ethnic background, gender and the construction related job titles that fall within relevant Federal occupational categories; and
- (3) a list of all contracts included in the aggregation of data, contract number, contract amount and location of work.

(b) Where required by the director, [Contracting] contracting agencies shall submit to the division on a semi-annual basis copies of the total work force data submitted by contractors in

the cases where the work force utilized on a State contract could not be separated out from the contractor's and/or subcontractor's total work force.

(c) Where a State agency enters into a State contract with a total expenditure in excess of two hundred and fifty thousand dollars (\$250,000) contractors shall submit company workforce diversity data to the State agency prior to the execution the subject State contract. The director shall provide each State agency with a company workforce diversity data form for data collection purposes.

143.6 Work Force Diversity dispute resolution procedure.

(a) If a contracting agency determines that a contractor is in noncompliance with the requirements of this Part, the contracting agency shall make every effort to resolve the matter and to bring the contractor into compliance with such requirements. If the contracting agency is unsuccessful in its efforts, the contracting agency shall submit a written complaint to the director, pursuant to Section 316 of the Executive Law, regarding the contractor's noncompliance and shall recommend to the director that the director review and attempt to resolve the noncompliance matter. The contracting agency shall serve a copy of its complaint upon the contractor by personal service or certified mail, return receipt requested. (b) For all State contracts that it bids and awards, the Office of General Services shall have the function of determining a contractor's compliance with the EEO requirements of this Part. (c) The director shall attempt to resolve a noncompliance dispute between the contracting agency and the contractor or subcontractor. If a resolution of the noncompliance dispute is satisfactory to the parties, the parties shall so indicate by signing a dispute resolution memorandum indicating that the matter has been resolved and stating the terms of the resolution.

(d) If the director is unable to resolve the noncompliance dispute to the satisfaction of the parties, the director shall refer the contracting agency's complaint, within 30 calendar days of the receipt of the complaint, to the division's hearing officer for a hearing.

(e) Upon conclusion of the administrative hearing, the hearing officer shall submit to the director a decision regarding the noncompliance dispute and the imposition of sanctions, fines or penalties, as provided for in the relevant sections of the contract, if appropriate, or a dismissal of the State agency's complaint, if appropriate.

(f) The director, within 10 business days of receipt of the decision, shall mail a determination of such matter to the contracting agency and shall cause a copy of such determination, along with a copy of article 15-A of the Executive Law [, article 15-A,] to be served upon the contractor or subcontractor by personal service or by certified mail, return receipt requested.

(g) The decision of the hearing officer shall be final and may only be vacated or modified as provided in article 78 of the Civil Practice Law and Rules.

(h) Nothing in this section is meant to diminish or supersede a contracting agency's authority and responsibility to enforce the requirements of its contracts.

Subdivision (b) of section 144.6 of 5 NYCRR Part 144 is amended and a new subdivision (i) is added to section 144.6 to read as follows:

Part 144. Statewide Certification Program.

144.1 Purpose, scope and applicability.

(a) The purpose of this Part is to provide criteria and procedures by which the director makes determinations to approve, deny or revoke the minority- or woman- owned business enterprise status of applicants and certified business enterprises.

(b) This Part is applicable to the certification of businesses as minority- and woman-owned businesses under article 15-A of the Executive Law.

144.2 Eligibility criteria.

The following standards shall be used to determine whether a business enterprise is eligible to be certified as a minority- or woman-owned business enterprise.

(a) Ownership. For the purposes of determining whether an applicant should be granted or denied minority- or woman-owned business enterprise status, or whether such status should be revoked, the following rules regarding ownership shall be applied on the basis of information supplied in relation to the application:

- (1) the contribution of the minority group member(s) or woman owner must be proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise;
 - (2) the business enterprise must demonstrate that it is an independent, continuing entity which has been actively seeking contracts or orders and regularly and actively performing business activities;
 - (3) a sole proprietorship must be owned by a minority group member or woman;
 - (4) a partnership must demonstrate that minority group members or women have a [51] fifty-one percent or greater share of the partnership; and
 - (5) a corporation must have issued at least [50] fifty-one (51) percent of its authorized voting and all other stock to minority group members or women shareholders.
- (b) Control. Determinations as to whether minority group members or women control the business enterprise will be made according to the following criteria:
- (1) Decisions pertaining to the operations of the business enterprise must be made by minority group members or women claiming ownership of that business enterprise. The following will be considered in this regard:
 - (i) Minority group members or women must have adequate managerial experience or technical competence in the business enterprise seeking certification.
 - (ii) Minority group members or women must demonstrate the working knowledge and ability needed to operate the business enterprise.
 - (iii) Minority group members or women must show that they devote time on an ongoing basis to the daily operation of the business enterprise.
 - (2) Articles of incorporation, corporate bylaws, partnership agreements and other agreements including, but not limited to, loan agreements, lease agreements, supply agreements, credit agreements or other agreements must permit minority group members or women who claim ownership of the business enterprise to make those decisions without restrictions.
 - (3) Minority group members or women must demonstrate control of negotiations, signature authority for payroll, leases, letters of credit, insurance bonds, banking services and contracts, and other business transactions through production of relevant documents.

(c) Additional requirements. The following requirements apply to all applicants seeking minority- and women-owned business enterprise status and inclusion in the directory of certified businesses:

(1) documentation may be required to substantiate the claim of membership in a minority group. This documentation may include, but is not limited to: birth certificates, naturalization papers, registration on Indian tribal rolls, and nonresident visas;

(2) an eligible minority group member or woman applicant must be an independent business enterprise. The ownership and control by the minority group member or woman must be real, substantial and continuing and must go beyond the pro forma ownership of business as reflected in the ownership documents. The minority group member or woman owner [shall] must enjoy the customary incidents of ownership and [shall] must share in the risks and profits, in proportion with their ownership interest in the business enterprise;

(3) where the actual management of the business enterprise is contracted out to individuals other than minority group members or women, minority group members and women must demonstrate that they have the ultimate power to hire and fire these managers, that they exercise this power and make other substantial decisions which reflect control of the business enterprise;

(4) applicants are required to conduct business activities for, generally, at least one year prior to the application date. Applicants who have been conducting business activities for less than one year, may not be able to provide sufficient information upon which a certification decision can reasonably be made, and therefore their application may be rejected; and

(5) the division shall not be required to conduct a site visit to the applicant's place of business where an out-of-state firm possesses certification from a State agency in the applicant's home state which conducts a certification program recognized by the division, or possess certification from an agency located in any other state which conducts a certification program recognized by the division. Evidence of this certification must be submitted to the division. In those instances where an out-of-state applicant does not possess certification from a recognized certification program, the director may request a site visit of the applicant's place of business to be performed by an employee, agent or representative of the division.

(6) the division may require additional documentation in order to ascertain and/or identify an applicant's ability and/or capacity to perform a commercially useful function on certain State contracts.

144.3 Application intake and verification.

- (a) Applications for certification may be obtained from and returned to the division.
- (b) The division shall date stamp an application upon receiving it. If an application is received by the division and required documents are missing, questions are unanswered or the application is not properly notarized, the division will notify the applicant within [20 days] thirty (30) days of the initial date stamped on the application of the status of its application and any deficiency arising from missing documents, unfinished questions or deficiencies in notarization. An applicant may cure the noticed deficiency by providing the division with documents or information requested in the notice of status and deficiency, within [20] twenty (20) days of the date of the notice of status and deficiency.
- (c) When the applicant cures a noticed deficiency, pursuant to procedures set forth in subdivision (b) of this section, the division shall have an additional [30] thirty (30) days to advise the applicant of any further deficiency, which deficiency may be cured in accordance with subdivision (b) of this section.
- (d) If the applicant does not cure a noticed deficiency, pursuant to procedures set forth in subdivision (b) of this section and the application remains incomplete, for at least [20] twenty (20) days of the date of the notice of deficiency, the applicant shall be notified, in writing, that its application has been rejected and will not be processed.
- (e) An applicant may not reapply for certification for at least [90] ninety (90) days of the date of the notice of rejection of its application.
- (f) Applicants for certification may be required to submit additional information including, but not limited to, tax and financial information, leases and business agreements and consent to inquiries of bonding companies, banking institutions, credit agencies, contractors, affiliates and clients to ascertain the applicant's eligibility for certification. Refusal to permit such inquiries shall be grounds for rejection of a certification application.
- (g) An application shall be deemed complete when [a site visit, if required, by the division to the applicant's place of business has occurred, or when a] written notice has been sent to the applicant by the division stating that its application is complete.

- (h) An applicant's refusal to permit an inspection of its place of business shall be grounds for rejection of the application.
- (i) An application may be withdrawn by an applicant without prejudice at any time prior to a site visit, or before the division has sent a notice that an application has been completed. Following the withdrawal of an application, the applicant may not reapply for certification for a period of at least [90] ninety (90) days.
- (j) In the event there are no certified minority- or women-owned business enterprises available for a contracting opportunity with a State agency, the director may permit a minority- and women-owned business enterprise that has submitted a fully documented application, to be temporarily certified for [90] ninety (90) days. If the certification process is not completed, as required by this Part, or certification is denied, the certification shall terminate as of the date the notice of determination is mailed by the division.
- (k) Vendor responsibility is not a certification issue. Each State agency independently verifies vendor responsibility per each solicitation.

144.4 Notice of determination, right to appeal and requests for hearing.

- (a) Within [60] sixty (60) days of [a site visit, or] the mailing of a notice by the division that the application has been completed, the director shall provide the applicant with written notice of a determination approving or denying certification status.
- (b) In the event a determination is made to approve certification by the director, the applicant will be provided with written notice of such determination and will hold minority- or women-owned business enterprise status for three years or until notified of the need to reapply at the director's request.
- (c) In the event a determination is made to deny certification, a written notice of such determination shall be provided to the applicant stating the reason(s) for denial. Such notice shall also state the procedures for filing an appeal before a[n] hearing officer.
- (d) The applicant may request a hearing to appeal the determination within [30] thirty (30) days of the receipt of the notice of denial. In the event that a request for a hearing is not made within the [30-day] thirty (30) day period, the director's determination shall be deemed final and the applicant may not reapply for certification for two years from the date of the written notice

denying certification, provided, however, that if the facts and circumstances forming the basis of the denial decision have changed significantly, the applicant may reapply sooner.

(e) The request for a hearing shall state the bases upon which the denial of certification is being appealed and shall be based on information or documents provided with an application and pursuant to any site visit that may have been carried out.

144.5 Appeals.

(a) The hearing officer shall conduct a hearing based upon information set forth in the request for a hearing relating to the information provided with the certification application and during any site visit that had been carried out. The hearing officer may request additional information of the applicant and the division and take other actions necessary to make an informed decision.

(b) The hearing officer shall issue a decision to the director to affirm, reverse or modify the original determination. Within thirty (30) days of the receipt of the decision by the director, the director shall accept, reject or modify the hearing officer's decision and set forth in writing the reasons for doing so. The director shall forward a copy of the decision to the applicant by personal service or certified mail, return receipt requested. In the event that the decision is to deny certification, the applicant may not reapply for certification for two years from the date of the original notification of denial of certification, provided, however, that if the facts and circumstances forming the basis of the denial decision have changed significantly, the applicant may reapply sooner.

(c) The decision of the hearing officer or the director shall be subject to review, pursuant to article 78 of the Civil Practice Law and Rules.

144.6 Revocation of minority- or woman-owned business enterprise status.

(a) The director shall revoke the minority- or woman-owned business enterprise status of a certified business for a period of two years, if it is demonstrated that minority group members or women no longer own and control the business enterprise in accordance with rules set forth in section 144.2 of this Part.

(1) A certified business enterprise must notify the division within [30] thirty (30) days of any material change in the information contained in the original application. A material change may include, but is not limited to, any of the following developments: a change in ethnicity, sex, percentage of ownership in the business enterprise, address, officers or services provided by the certified business. If a material change is indicated, a review may be conducted by the division.

(b) The division, only upon receiving specific allegations [indicating] based in facts which indicate that a certified business enterprise is no longer entitled to minority- or woman-owned business enterprise status, may take the following actions:

(1) determine whether the allegation can be substantiated;

(2) obtain in writing, if possible, the basis of any allegation from the person or persons making the allegation;

(3) notify a certified business in writing upon a determination that its minority- or woman-owned business enterprise status is under review by the director and may be revoked. This notice shall specify the bases for such review and any facts specifically at issue;

(4) provide the certified business whose minority- or woman-owned business enterprise status is under review, with an opportunity to respond in writing to any allegations set forth in notices of certification status review within [20] twenty (20) days of the date of such notice, by personal service or certified mail, return receipt requested; and

(5) meet or conduct site visits, as necessary, with minority group members or women claiming ownership and control of the certified business enterprise.

(c) If the minority group members or women claiming ownership of the certified business fail to timely respond in writing to the notice of certification status review, or fail to meet or agree to a site visit, the minority- or woman-owned business status of the certified business enterprise shall be revoked by the director.

(d) The director shall notify, in writing, a business of the revocation of its minority- or woman-owned business enterprise status within [10] ten (10) days of revoking such status. The minority group members or women claiming ownership and control of a business which has had its minority- or woman-owned business enterprise status revoked, may request a hearing before a[n] hearing officer within [30] thirty (30) days of the date of the notice of revocation. Such hearing shall be conducted in accordance with procedures set forth in Section 145.1. If a request for a hearing is not made within the [30-day] thirty (30) day period, the director's determination shall

be final and the business enterprise may not reapply for certification for two years from the date of the notice of revocation provided, however, that if the facts and circumstances forming the basis of the revocation decision have changed significantly, the business enterprise may reapply sooner.

(e) The minority group members or women shall be provided with notice of the date, time and place of their hearing before the hearing officer, at least [10] ten (10) days prior to the date of the hearing.

(f) The hearing officer shall conduct a hearing and render a decision whether the certified business should retain its minority- or woman-owned business enterprise status, or whether such status should be revoked in accordance with subdivision (a) of this section. The hearing officer may request additional information of the minority group members or women who requested the hearing, or the division.

(g) The hearing officer shall issue a decision to the director to affirm, reverse or modify the original determination. Within [30] thirty (30) days of the decision, the director shall accept, reject or modify the hearing officer's decision and set forth in writing the reasons for doing so. The director shall forward a copy of the decision to the business enterprise by personal service or certified mail, return receipt requested. In the event of a decision to revoke the minority- or woman-owned business enterprise status of a business enterprise, the business enterprise may not reapply for certification for two years from the date of the original notice of revocation, provided, however, that if the facts and circumstances forming the basis of the revocation decision have changed significantly, the business enterprise may reapply sooner.

(h) The final decision of the director [hearing officer] shall be subject to review, pursuant to article 78 of the Civil Practice Law and Rules.

(i) During the pendency of a challenge, a presumption of eligibility shall remain in effect for the challenged certified minority- and women-owned business enterprise.

144.7 Criteria for acceptance of federal certification in lieu of completing and submitting the New York State minority- and women-owned business enterprise certification application.

(a) The division shall approve an applicant as a certified business without requiring that applicant to complete the New York State minority- and woman-owned business enterprise certification application provided:

(1) the applicant demonstrates that it holds a current Federal certification pursuant to Title 49 CFR Part 26 or Title 13 CFR Part 124 by submitting a true copy of the certification to the division;

(2) the applicant completes the [Supplemental Application] supplemental application;

(3) the applicant provides a signed authorization for the exchange of information between the division and the certifying entity for the purpose of determining the applicant's eligibility for certification;

(4) an owner, a partner or a principal officer that is authorized to act on behalf of the applicant signed and has notarized an attestation that the information submitted in connection with the Federal certification is accurate to the best of that person's knowledge; and

(5) the applicant provides proof satisfactory to the division that the applicant is owned, operated and controlled by women or minority group members and that the individual or individuals whose ownership, control and operation are relied upon for certification, meet the requirements of personal net worth and the definition of small business set forth in these regulations.

Documentation referenced in section 144.2(c)(1) of this Part may be required to substantiate the claim of membership in a minority group or gender.

(b) Notwithstanding anything to the contrary in section 144.7(1) above, the division reserves the right to (1) conduct an investigation of an applicant (which may include, but not be limited to, conducting a site visit to the applicant's place of business, and or requesting documentation from the applicant) to verify that the applicant meets all of the eligibility criteria set forth in Executive Law section 314 and section 144.2 of this Part, and

(2) reject or deny certification if the division is not satisfied that the applicant meets all of the eligibility criteria set forth in Executive Law section 314 and section 144.2 of this Part.

(c) After verification by the division that an applicant has satisfied all of the criteria in section 144.7(1)(i)-(v), and 144.7(2) if applicable, such applicant shall become certified as a minority- or women-owned business enterprise without completing the New York State minority- and woman-owned business enterprise certification application.

(d) The process described in section 144.4 of this Part will apply to Supplemental Applications.

144.8 Criteria for acceptance of New York municipal certification in lieu of completing and submitting the New York State minority- and women-owned business enterprise certification application.

- (a) The division shall approve an applicant as a certified business without requiring that applicant to complete the New York State minority- and woman-owned business enterprise certification application provided: (1) the applicant demonstrates that it holds a current New York municipal certification with an active municipal certification program by submitting a true copy of the certification to division; (2) the applicant completes the [Supplemental Application] supplemental application; (3) the applicant provides a signed authorization for the exchange of information between the division and the municipal certifying entity for the purpose of determining the applicant's eligibility for certification; (4) an owner, a partner or a principal officer that is authorized to act on behalf of the applicant signed and has notarized an attestation that the information submitted in connection with the New York municipal certification is accurate to the best of that person's knowledge; and (5) the applicant provides proof satisfactory to the division that the applicant is owned, operated and controlled by women or minority group members and that the individual or individuals whose ownership, control and operation are relied upon for certification, meet the requirements of personal net worth and the definition of small business set forth in this regulation. Documentation referenced in section 144.2(c)(1) of this Part may be required to substantiate the claim of membership in a minority group or gender.
- (b) Notwithstanding anything to the contrary in section 144.8(1) above, the division reserves the right to (1) conduct an investigation of an applicant (which may include, but not be limited to, conducting a site visit to the applicant's place of business, and or requesting documentation from the applicant) to verify that the applicant meets all of the eligibility criteria set forth in Executive Law section 314 and section 144.2 of this Part, and (2) reject or deny certification if the division is not satisfied that the applicant meets all of the eligibility criteria set forth in Executive Law section 314 and section 144.2 of this Part.
- (c) After verification by the division that an applicant has satisfied all of the criteria in section 144.8(1)(i)-(v), and 144.8(2) if applicable, such applicant shall become certified as a minority- or

women-owned business enterprise without completing the New York State minority- and woman-owned business enterprise certification application.

(d) The process described in section 144.4 of this Part will apply to [Supplemental Application] supplemental application.

Part 145. Procedures for the conduct of hearings, the division's annual report, and severability.

145.1 Procedures for conduct of hearings.

(a) The petitioner shall be provided with notice of the date, time and place of their hearing before the hearing officer at least 20 days prior to the date of the hearing.

(b) The notice shall include, but not be limited to, the following information:

(1) a statement of the legal authority and jurisdiction pursuant to which the hearing is being held;

(2) where possible, a reference to the specific sections of the statute, regulations and/or standards involved;

(3) a statement of the matters raised and the issue(s) to be determined, provided, however, that nothing shall preclude the consideration at the hearing of relevant issues not raised in the notice, in a manner consistent with the petitioner's right to respond to such issues;

(4) the identity of the hearing officer designated to conduct the hearing;

(5) the identity of the individual representing the division in the proceeding; and

(6) the procedure to apply for an adjournment or withdrawal of the petitioner's request for a hearing.

(c) The notice shall be personally served or sent by certified mail, return receipt requested, to all parties to the proceeding.

(d) Limited discovery shall be permitted to [an] a petitioner in any proceeding before a hearing officer.

(1) The documents to be discovered shall be limited to those which, as of the date of the discovery request, the division has in its possession and intends to introduce in the course of the proceeding.

(2) There shall be no depositions taken of potential witnesses prior to the hearing.

(e) A request for discovery of documents shall be made in writing to the individual representing the division in the proceeding, as set forth in the notice of hearing, with a copy sent to the hearing officer designated to conduct the hearing, at least 10 days prior to the date of the hearing.

(1) The request shall set forth the specific documents being requested.

(2) Requested documents which are properly discoverable shall be provided to the petitioner or its attorney, if applicable, within [10] ten (10) days after the receipt of the written request, unless due to the volume of documents being requested, the copying of such documents cannot be completed within such period.

(3) Where the documents cannot be provided within [10] ten (10) days, written notice of such shall be given to the requester, with a copy to be sent to the hearing officer designated to conduct the hearing. Such notice shall state when the requested documents are expected to be provided and the reason(s) for the delay.

(f) The petitioner may request recusal of a hearing officer designated to conduct the hearing. Grounds for recusal shall be limited to an actual conflict of interest or an appearance of impropriety which is of such seriousness that it would prevent fair and impartial adjudication of the issues.

(g) A petitioner requesting recusal of the hearing officer designated to conduct the hearing must submit a written request to the director, with a copy to be sent to the individual representing the division in the proceeding.

(h) The request for recusal must be made within [15] fifteen (15) days after the receipt of the notice of hearing, or 10 days prior to the date of the hearing, whichever is earlier.

(i) The request shall include the specific basis for the application for recusal and a statement setting forth why recusal would be proper under the circumstances.

(j) The director shall respond in writing to any request for recusal within five business days of receipt of the request. Where recusal is denied, the director shall set forth the reasons for such denial.

(k) The hearing officer shall regulate the course of the hearing, set the time and place for continued hearings and fix the time for the filing of documents.

(l) The hearing officer shall not be bound by technical rules of evidence or procedure. The hearing officer shall conduct the hearing in such order and manner as he or she deems appropriate to ascertain the substantial rights of the parties. All parties shall be accorded full

opportunity to present evidence and written and oral argument, provided however, that the hearing officer may exclude irrelevant or unduly repetitious evidence or cross-examination from any proceeding.

(m) All testimony shall be under oath or by affirmation, and a record of the proceeding shall be made.

(n) Any party may appear in person or be represented by an attorney. The hearing officer may examine the parties and their witnesses. Any party shall have the right to call witnesses and examine and cross-examine other parties and their witnesses.

(o) The hearing officer may issue subpoenas in the name of the division, at the request of any party, requiring attendance and giving of testimony by witnesses and the production of books, papers, documents and other evidence. Any required fees shall be paid by the party requesting the subpoena.

(p) An adjournment may be directed or granted by a hearing officer in his/her discretion but only upon a showing of good cause and upon a request made to the hearing officer at least seven days prior to the scheduled date of the hearing. In such event, he/she shall explain to the parties the reason for such adjournment. No appeal shall be delayed unreasonably.

(q) The hearing officer will consider a request to be withdrawn under the following circumstances:

(1) the hearing officer has received a written statement from the petitioner, or the petitioner's attorney; stating that the request for a hearing is withdrawn; or

(2) the petitioner, or the petitioner's attorney, fails to appear at the scheduled hearing.

(r) In the absence, disability or disqualification of a hearing officer or for other good cause, a hearing may be transferred to another hearing officer.

(s) The hearing officer shall render a written decision and serve a copy of the decision to the parties by personal service or certified mail, return receipt requested, within 60 days of the final hearing.

145.2 The division's annual report and guidelines and best practices manual.

(a) The division shall submit an annual report to the Chief Diversity Officer on or before November 1 which:

- (1) summarizes the report submitted by each contracting agency pursuant to section 141.4 of this regulation;
 - (2) contains such comparative or other information as the director deems appropriate, including but not limited to goals compared to actual participation of certified minority- and women-owned business enterprises in state contracting, to evaluate the effectiveness of the activities undertaken by each such contracting agency to promote increased participation by certified minority or women-owned businesses with respect to state contracts and subcontracts;
 - (3) contains a summary of all waivers of the requirements of section 142.7 of this regulation allowed by each contracting agency during the period covered by the report, including a description of the basis of the waiver request and the contracting agency's rationale for granting any such waiver;
 - (4) describes any efforts to create a database or other information storage and retrieval system containing information relevant to contracting with certified minority- and women-owned business enterprises; and
 - (5) contains a summary of (i) all determinations of violations of this article by a contractor or a contracting agency made during the period covered by the annual report and (ii) the penalties or sanctions, if any, assessed in connection with such determinations and the rationale for such penalties or sanctions.
- (6) Copies of the annual report shall be provided to the commissioner, the governor, the comptroller, the temporary president of the senate, the speaker of the assembly, the minority leader of the senate, the minority leader of the assembly and shall also be made widely available to the public via, among other things, publication on a website maintained by the division of minority and women's business development.
- (b) The division shall distribute, on or before December 15th of every year, to every State agency, a written guidelines and best practices manual for fulfilling the interest of Article 15(a) of the Executive Law and calculating credits towards achieving agency minority- and women-owned business enterprise goals.

145.3 Severability

If any clause, sentence, paragraph, section or part of these regulations shall be adjudged by any court of competent jurisdiction to be invalid, the judgment shall not affect, impair, or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, section or part of this act directly involved in the controversy in which the judgment shall have been rendered